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August 31, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: WT Docket No. 94-147

Dear Ms. Salas:

Transmitted herewith, on behalf of James A. Kay, Jr., is an original and fourteen (14) copies of his Comments on Emergency Motion for Expedited Action. Should the Commission have any questions with respect to this filing, please communicate with the undersigned.

Sincerely yours,



Aaron P. Shainis

Counsel for

JAMES A. KAY, JR.

Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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AUG 31 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
JAMES A. KAY, JR.)
)
)
Licensee of 152 Part 90 Stations in the)
Los Angeles, California Area)

WT DOCKET NO. 94-147

To: The Commission

**COMMENTS ON EMERGENCY MOTION
FOR EXPEDITED ACTION**

James A. Kay, Jr. ("Kay"), by his attorneys, hereby files his Comments with respect to the Emergency Motion for Expedited Action filed on August 25, 1998 by the Wireless Telecommunications Bureau (the "Bureau"). In support of his position, Kay submits the following:

On August 4, 1998 and August 18, 1998, Kay filed Appeals with the Commission requesting disqualification of the Presiding Judge in view of the Judge's demonstrated predisposition against Kay and his counsel. The Bureau seeks expedited action by the Commission with respect to ruling on Kay's Appeals, as well as other relief. Kay supports expedited action since, ultimately, it is Kay who has been prejudiced by delay in this proceeding. It is Kay who has lived under constant government challenge to his qualifications over the last four years. It is Kay who has had his character slurred repeatedly by the Bureau and who has been placed in the position of having to fight for his continued business existence.

Kay desires a hearing. However, Kay is particular in those desires, since he only wishes a hearing before a non-biased Presiding Judge. The Bureau characterizes Kay's wishes as evidence of an abuse of process ("the Bureau believes that the sole purpose of Kay's motion is to further delay the hearing, and the Commission should not permit this misuse and abuse of its processes"; "The Bureau believes Kay's attempts to disqualify the Presiding Judge are frivolous and that his pleadings were filed for the purpose of staying the hearing.")¹

In its effort to prove its accusation, the Bureau engages in historical revisionism. For example, in providing a timeline summarizing the history of the case, the Bureau claims that Kay alone must assume responsibility for a prior 120 day stay of the proceedings to allow the parties (Kay and the Bureau) an opportunity to settle the case. ("The Presiding Judge stayed the proceeding for 120 days in order to give Kay the opportunity to settle the proceeding . . . Kay's efforts were not successful, and the stay period lapsed.") (emphasis added).²

Heretofore, Kay was under the naive impression that it was in the public interest for parties to settle pending cases where possible. Obviously, it is difficult for parties to settle if an effort is not made by both parties. Thus, in this case, it was not "Kay's efforts," but the efforts of both parties which, unfortunately, were unsuccessful. To blame Kay for the breakdown of settlement discussions is emblematic of the Bureau's attempt to transmogrify every incident in this proceeding as part of some continuing conspiracy by Kay to abuse the Commission's processes.³

¹ Wireless Telecommunications Bureau's Emergency Motion for Expedited Action, filed August 25, 1998 at pp.1, 5.

² Wireless Telecommunications Bureau's Emergency Motion for Expedited Action at p. 2.

³ The Bureau's characterization of settlement efforts as being the responsibility of Kay alone may explain why the Bureau up to now has been so unwilling to engage in meaningful settlement discussions.

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Additionally, the Bureau, in its history of the case, does not attempt to analyze the fact that nine months were lost as a result of the Presiding Judge's procedurally indefensible effort to issue a summary decision revoking Kay's licenses. This case was sent back to the Judge not four years ago, but eighteen months ago.⁴

In fact, contrary to the Bureau's unsupported conclusions, Kay has acted reasonably in his efforts to defend himself. Kay, as well as the Bureau, conducted extensive discovery starting in 1997 and continuing until the last few months. Kay filed a "Petition for Extraordinary Relief," which requested that the Commission stay the hearing, but continued fully participating in this proceeding while the Commission reviewed his Petition. On June 29, 1998, Kay exchanged his direct case exhibits.

Kay's Appeals to disqualify the Presiding Judge are not evidence of an abuse of process, but rather constitute bona fide efforts to receive due process. While the Bureau may disagree with Kay's legal position,⁵ that hardly renders Kay's pleadings frivolous or an abuse of process.

Further, the Bureau's suggestions as to how to expedite this proceeding would seriously violate Kay's due process rights. The Bureau would have the Commission issue a bifurcated decision, first releasing a ruling without reasons, then following up at some unstated time with an explanation for

⁴ It was Kay, not the Bureau, who was prejudiced, in time and money, by the need to appeal the Judge's outrageous action.

⁵ It is noted that, while the Bureau disagrees with Kay's legal conclusions regarding the disqualification of the Presiding Judge, the Bureau, nonetheless, has characterized his actions as "insensitive" and "inappropriate." Wireless Telecommunications Bureau's Opposition to Supplement the Motion to Recuse Presiding Judge, filed July 30, 1998 at pp. 1, 3. It is further noted that Kay's right to request withdrawal of the presiding officer would be deemed waived under Section 1.245 (b)(3) of the rules unless an interlocutory appeal is filed.

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its judgment and/or vacate the automatic stay provision included in Section 1.245 (b)(4) of the rules.⁶ Not only do the Bureau's suggestions violate the Commission's rules as well as Kay's due process rights, they make no sense. While the Commission does release Memorandum Opinion and Orders, it does not follow the Alice in Wonderland procedure of releasing Orders with Memorandum and Opinions to follow some time in the future. Moreover, the reason the Commission's rules call for a suspension of hearings pending a decision as to the withdrawal of a presiding officer is because following the Bureau's recommendation could lead to invalid hearings being conducted by a presiding officer who is in the process of being replaced.

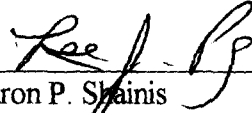
In sum, Kay supports expedited action on Kay's appeals. Kay does not favor trampling on his right to fundamental fairness, as well as violating the Commission's rules so that the Bureau can be made happy. While the Bureau's actions throughout this proceeding evidence a "Hang em High" mentality under the apparent belief that anything that serves to bring Kay one day closer to the administrative executioner must serve the public interest, Kay clings to the illusion that, despite the efforts of the Bureau and the Presiding Judge, Kay may receive justice.

Respectfully submitted,

JAMES A. KAY, JR.

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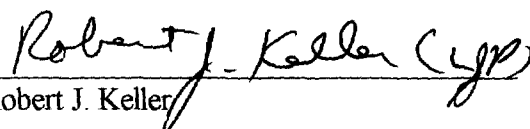
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Robert J. Keller

August 31, 1998

⁶ Wireless Telecommunications Bureau Emergency Motion for Expedited Action at pp. 5, 6.
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CERTIFICATE OF SERVICE

I, Sue E. Murray, Secretary, in the law firm of Shainis & Peltzman, Chartered, do hereby certify that on this 31st day of August, 1998, copies of the foregoing document were sent, via hand delivery to the following:

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